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No. 87-832

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES ARNOLD
SPECIALIST FIVE, UNITED STATES ARMY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In our petition we argue that the Court of Military Appeals erred by holding that a showing of unavailability of a declarant is not required for purposes of the Confrontation Clause of the sixth amendment, where the out-of-court statement of the declarant is offered under a firmly rooted exception to the hearsay rule. We also argue that notwithstanding the characterization of the statement in this case as an excited utterance by the court below, the statement does not bear adequate indicia of reliability to satisfy the Confrontation Clause.

Respondent incorrectly implies that the hearsay statement in question was offered only to corroborate Petitioner's recanted confession, in an apparent attempt to minimize the constitutional impact of the statement's improper admission. Respondent also suggests that a finding of unavailability of the declarant would have been justified in this case. Both of these assertions are contrary to the record. Further, con-

trary to Respondent's assertion, Petitioner does not concede that his daughter's statement was an excited utterance.

We reply to Respondent's arguments in *seriatim*:

(A) RESPONDENT'S ARGUMENT THAT THE HEARSAY STATEMENT WAS OFFERED ONLY TO CORROBORATE PETITIONER'S RECANTED CONFESSION

In his dissent below, Chief Judge Everett correctly points out "the issue is not one of the sufficiency of evidence to corroborate a confession but instead whether an accused has been prejudiced by reception of inadmissible evidence" (Pet. App. 11a). Although the statement of Petitioner's daughter may have had the effect of corroborating Petitioner's recanted confession, it was in fact admitted as substantive evidence at trial. No instruction was given by the trial judge limiting the court-martial members' consideration of the statement. To the contrary, the trial judge specifically instructed that the statement could be considered as substantive evidence (R. 304).

Whether or not the statement was admitted to corroborate Petitioner's recanted confession as Respondent asserts (Br. in Opp. 2,4) is of no real significance to the extent that it is clear from the record that the statement was offered, admitted, and considered as substantive evidence against Petitioner. The degree of the constitutional error committed is not minimized by Respondent's belief that the original goal of the government at trial was corroboration of a confession.

(B) RESPONDENT'S ARGUMENT THAT A FINDING OF UNAVAILABILITY OF THE DECLARANT WOULD HAVE BEEN JUSTIFIED

Respondent states that the trial court would have been justified in finding that Petitioner's daughter, Charise, was unavailable to testify at trial (Br. in Opp. 6). This position is totally contrary to that expressed by both the Court of Military Appeals and the Army Court of Military Review. Those courts correctly recognized that the government made no more than an "informal effort" (Pet. App. 2a) to have

Charise appear, and in fact "failed utterly to show unavailability" (Pet. App. 16a).[1]

(C) RESPONDENT'S ARGUMENT THAT ALL HEARSAY STATEMENTS ARE ADMISSIBLE WITHOUT A SHOWING OF UNAVAILABILITY IF THEY ARE RELIABLE

Respondent argues that *Ohio v. Roberts* is limited to its facts as clarified by *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986) (Br. in Opp. 7). Respondent urges the radical proposition that so long as a hearsay statement is presumptively reliable because it fails within a firmly rooted hearsay exception, the proponent need not show the declarant unavailable before that statement may be admitted as evidence against an accused. Petitioner submits, as this Court stated in *Bourjaily v. United States*, ___ U.S. ___, 107 S.Ct. 2775, 2782 (1987), that *Ohio v. Roberts* sets out the " 'general approach to the problem' of reconciling hearsay exceptions with the Confrontation Clause." However, *Inadi* and *Bourjaily* create an exception to that "general approach" only for statements of a co-conspirator made in the course and in furtherance of a conspiracy. Contrary to Respondent's position, *Inadi* is the exception and not the rule.[2]

The general rule laid out in *Ohio v. Roberts* includes two prongs, necessity and reliability. Respondent desires to eliminate the first. If a hearsay declarant is not present at trial for cross-examination, the proponent must first show that the declarant is unavailable in order to establish the necessity for using the statement in contravention of the accused's right of confrontation. *Ohio v. Roberts*, 448 U.S. at 66.

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[1] Certainly, the government failed to meet its burden of showing that there was a good-faith effort to obtain Charise's presence at trial. Barber v. Page, 390 U.S. 719, 724-25 (1968); Ohio v. Roberts, 448 U.S. 56, 74-75 (1980).

[2] Petitioner notes that the statement of a co-conspirator made during the course and in furtherance of a conspiracy is by definition not hearsay under both the military and the federal rules of evidence. *Compare*, Mil.R.Evid. 801(d)(2)(E) and Fed.R.Evid. 801(d)(2)(E).

If the declarant is available there is no need to abridge the right of confrontation. "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." *Inadi*, 106 S.Ct. at 1126. Respondent urges that use of the hearsay statement in this case is justified because the context in which the statement was made has evidentiary significance. Respondent cites *Inadi* as support for this position (Br. in Opp. 8). However, unlike the situation in *Inadi*, the hearsay statement in this case was not made during the commission of the offense by one criminally liable for the offense being prosecuted. Any evidentiary significance of the context in which the statement was made does not serve to meet the government's burden on an element of the offense nor has Respondent indicated why the context in which the statement was made cannot be explained or replicated during live testimony by the declarant before the trier of fact.[3]

Respondent urges this Court to accept the proposition that the proponent of a hearsay statement need not make a showing of unavailability of the declarant so long as the hearsay statement falls within a firmly rooted hearsay exception. If such a position is adopted, virtually all hearsay will be admissible against an accused without the opportunity for confrontation before the trier of fact. Only in those few remaining cases where the hearsay cannot be characterized as falling within a firmly rooted hearsay exception will an accused be permitted to confront the witnesses against him. Thus, the Confrontation Clause will become little more than a codification of the rules of hearsay.

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[3] Of course, the fact that the declarant in this case recanted her statement makes the task more difficult. But, Petitioner submits, that is part of the truth-finding process.

(D) RESPONDENT'S ARGUMENT THAT CHARACTERIZATION OF A HEARSAY STATEMENT AS AN EXCITED UTTERANCE BY THE COURT BELOW OBVIATES THE NEED FOR THE STATEMENT TO BEAR SUFFICIENT INDICIA OF RELIABILITY

Respondent represents that Petitioner concedes that his daughter's hearsay statement was an excited utterance (Br. in Opp. 5). Respondent misconstrues Petitioner's argument (Pet. 9).

In his opinion below, Judge Cox characterizes the hearsay statement in question as an "excited utterance" (Pet. App. 6a), a characterization with which Chief Judge Everett strongly disagrees in his dissent (Pet. App. 9a). Petitioner does not concede that Judge Cox's characterization was correct, rather Petitioner urges this Court not to consider itself bound by the improper characterization. Petitioner submits that the mere fact that the court below conveniently tucked this hearsay statement "into a pigeonhole which bears the label of a time-honored hearsay exception. . . .", should not be dispositive. *Puleio v. Vose*, 830 F.2d 1197, 1207 (1st Cir. 1987). We argue in the petition that it is necessary to consider whether the hearsay statement in question bears sufficient indicia of reliability to satisfy the purposes of the Confrontation Clause notwithstanding its characterization as an excited utterance by the court below. As we have pointed out, the hearsay statement of Petitioner's daughter does not meet the test for an excited utterance under the federal rules. *See, Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050 (6th Cir. 1983) *cert. denied* 464 U.S. 1071 (1984). Therefore, no presumption of reliability should attach for purposes of satisfying the Confrontation Clause, nor is the statement sufficiently reliable without the presumption to satisfy the purposes of the Clause.

CONCLUSION

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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